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# In the Supreme Court of the United States

OCTOBER TERM, 1966

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No. 365

AMBROSE DISTRIBUTING COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. 1c-6c) is reported at 358 F. 2d 319. The Board's decision and order (Pet. 1a-2a) are reported at 150 NLRB 1642.

### JURISDICTION

The court of appeals' decision (Pet. 1c-6c) was entered on March 9, 1966, and its decree (Pet. 1b-4b) on

April 8, 1966. A petition for rehearing was denied on April 26, 1966 (Pet. 2). The petition for certiorari was filed on July 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether there was substantial evidence in support of the Board's finding that the employer discharged two employees for anti-union reasons, rather than for good cause.

## STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, p. 8.

## STATEMENT

Petitioner is engaged in the wholesale distribution of meat and petroleum products. In the fall of 1963, Richard Byrd, one of the drivers at petitioner's Wendell, Idaho terminal joined the General Teamsters, Warehousemen, Chauffers & Helpers Union, Local No. 483, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Independent), and solicited other drivers to join (R. 19; Tr. 11-12).[1] In December 1963, the union filed a representation petition with the Board, and, on February 18, 1964, the Board conducted an election which the union lost (R. 19; Tr.

[1] "R." and "Tr." references are to Volumes I and II, respectively, of the record filed in the court of appeals.

4-5). Before and after the election, petitioner engaged in the following anti-union conduct:

In mid-December 1963, A. N. Ambrose, petitioner's owner, asked Thomas Smith, a driver, what he thought of the "union situation," and warned: "Now, whatever you fellows do, don't vote for the union" (R. 20; Tr. 63). On January 4, 1964, Manager Cooper accused Byrd of being the "instigator of this union business" and said that he had had "two guys in [his office] that swore that [Byrd] signed them up" (R. 19; Tr. 14). And, about January 20, while Byrd was talking to employee Gene Kuhn in the shop at Wendell, Ambrose approached them and cautioned Kuhn: "Be careful what you say, Byrd is going to be the new shop steward in the union" (R. 20; Tr. 16).

At about this time Byrd narrowly avoided colliding with another vehicle and scraped his trailer against a guardrail of a bridge, but the only damage consisted of some scratches in the paint (R. 20; Tr. 38-40). Byrd mentioned the incident to shop employees at Wendell, and Ambrose learned of it through them (R. 20; Tr. 40-42). About January 17, Ambrose told employees Byrd and Smith that he was considering the establishment of a fund for permanent employees should the union be defeated. Ambrose asserted that he was a fair man and would not bear resentment against an employee who had signed a union card designating the union as his bargaining representative—adding that, if this were not so, he could have used the scratched-paint incident as a basis for discharging Byrd (R. 20; Tr. 43).

In early February, prior to the Board election, Ambrose and Manager Cooper threatened to reduce the number of trucks operated if the union won (R. 19; Tr. 64-65, 92). About the same time, Ambrose told Smith that he could not understand why Byrd was for the union, considering the help that he had given Byrd in the past (R. 21; Tr. 66). After the election, Cooper told another employee that Byrd was promoting the union and upbraided Byrd for stirring up trouble and for reporting to an investigating Board agent what Cooper had said to Byrd about the union (R. 20; Tr. 20, 22, 93-94). Cooper accused Byrd of not having enough courage to fight his own battles and of having to call in outsiders for help (R. 20; Tr. 22).

In early March, Byrd and another driver delivered a trailer to petitioner's yard in Butte (R. 20; Tr. 25-26). On March 11, Ambrose telephoned Byrd and asked whether he had delivered the trailer (R. 20; Tr. 23). When Byrd said that he had, Ambrose accused Byrd of not having properly lowered the landing gear, thereby causing damage to the trailer (R. 20-21; Tr. 23). Byrd asserted that the trailer had been safely set when he left it (R. 21; Tr. 23). Ambrose replied that, considering the quality of the work he had been doing recently, and the fact that he had struck a bridge sometime earlier, he was discharged (R. 21; Tr. 23). Byrd became angry and called Ambrose a liar, asserting that Ambrose knew that he had not damaged any trailer in Butte (R. 21; Tr. 23). Ambrose replied: "Well that doesn't make any difference. I've got about five guys up here that

swear that you did" (R. 21; Tr. 24). Ambrose added that he should have been given some help when he needed it, and that Byrd, in consideration of all that had been done for him in the past, was one who should have supplied it (R. 21; Tr. 24).

Shortly thereafter, while driving a truck in Canada, employee Smith jackknifed the trailer, causing damage of less than $200 (R. 21; Tr. 70-72). Smith telephoned the dispatcher in Butte who instructed him to continue his trip (R. 21; Tr. 72). About March 18, Smith arrived in Butte, and, after the truck was repaired, waited in the Butte office for an expense check (R. 21; Tr. 72-74). Ambrose instructed Smith to proceed to Wendell, stating that he would bring the check down in a day or two; Ambrose added, "You won't be going out before Sunday, anyway" (R. 21; Tr. 72). On Saturday, March 21, when Smith met Ambrose at the Wendell office, Ambrose said: "Tom, you sure have me in a bind" (R. 21-22; Tr. 75). Smith asked why, and Ambrose explained that he had "fired those fellows[2] the other day that dropped that trailer up in Butte" and that, if he did not now discharge Smith, the union would force him to take the other men back to work (R. 22; Tr. 75-76). Ambrose suggested that, although he was discharging Smith, he would arrange for Smith to continue work by hauling hay in Smith's own truck. However, about the middle of April, when Smith telephoned

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[2] Although, according to Smith's testimony, Ambrose used the plural, there is no evidence that anyone other than Byrd was fired.

Ambrose and reported that he was prepared to start hauling, Ambrose stated that he did not have any work for him. (R. 22; Tr. 76-79.)

On these facts, the Board found that petitioner had violated Section 8(a)(1) of the Act by interrogating employees concerning their union activities, threatening them with reprisals, and promising them benefits if they desisted from such activities. The Board further found that petitioner had discharged employees Byrd and Smith for anti-union reasons and not because of their alleged deficiencies, thereby violating Section 8(a)(3) and (1) of the Act (R. 24, Pet. 1a-2a). Thus, the Board found that Byrd had been discharged because petitioner "correctly believed him to be a leader among the employees in the movement to establish the Union as bargaining representative," and that Smith had been discharged because it feared that "failure to take this action might strip from the discharge of Byrd the mantle of legality with which [petitioner] had sought to clothe it" (R. 23). The Board ordered petitioner to cease and desist from the unfair labor practices found, and to reinstate Byrd and Smith with back pay (R. 25-26, Pet. 2a).

The court of appeals sustained the Board's findings and enforced its order in full (Pet. 1c-6c).

## ARGUMENT

The Board found, and the court of appeals sustained its finding, that employees Byrd and Smith were discharged for anti-union reasons and not for the deficiencies asserted by petitioner. The sole issue

presented is whether this finding is supported by substantial evidence on the record as a whole. Such an issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, the evidence summarized in the Statement, *supra*, demonstrates, we submit, that there was ample support for the Board's finding.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1966.

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

### RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

### UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

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